Guideline Sentencing Update

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General Application Principles

Sentencing Factors

Supreme Court holds that conduct from acquitted counts may be used in guideline calculation. "In these two cases, two panels of the Court of Appeals for the Ninth Circuit held that sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted. . . . Every other Court of Appeals has held that a sentencing court may do so, if the Government establishes that conduct by a preponderance of the evidence. . . . Because the panels' holdings conflict with the clear implications of 18 U.S.C. § 3661, the Sentencing Guidelines, and this Court's decisions, particularly *Witte v. United States*, . . . 115 S. Ct. 2199 . . . (1995), we grant the petition and reverse in both cases."

"We begin our analysis with 18 U.S.C. § 3661, which codifies the longstanding principle that sentencing courts have broad discretion to consider various kinds of information. . . . We reiterated this principle in *Williams v. New York*, 337 U.S. 241 . . . (1949), in which a defendant convicted of murder and sentenced to death challenged the sentencing court's reliance on information that the defendant had been involved in 30 burglaries of which he had not been convicted. . . . Neither the broad language of § 3661 nor our holding in *Williams* suggests any basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing. Indeed, under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted.'"

"The Guidelines did not alter this aspect of the sentencing court's discretion." Section 1B1.4 allows sentencing courts to "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," and for "certain offenses . . . USSG § 1B1.3(a)(2) requires the sentencing court to consider 'all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction.' Application Note 3 explains that '[a]pplication of this provision does not require the defendant, in fact, to have been convicted of multiple counts.' . . . In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."

"The Court of Appeals' position to the contrary not only conflicts with the implications of the Guidelines, but it also seems to be based on erroneous views of our double jeopardy jurisprudence. . . . In *Witte*, we held that a sentencing court could, consistent with the Double Jeopardy Clause, consider uncharged cocaine importation in imposing a sentence on marijuana charges that was within the statutory range, without precluding the defendant's subsequent prosecution for the cocaine offense. We concluded that 'consideration of information about the defendant's character and conduct at sentencing does not result in "punishment" for any offense other than the one of which the defendant was convicted.' . . . 115 S. Ct. at 2207. Rather, the defendant is 'punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment.'"

"The Court of Appeals likewise misunderstood the preclusive effect of an acquittal, when it asserted that a jury 'rejects' some facts when it returns a general verdict of not guilty. . . . We have explained that 'acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.' . . . [T]he jury cannot be said to have 'necessarily rejected' any facts when it returns a general verdict of not guilty."

"We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence. The cases before us today do not present such exceptional circumstances, and we therefore do not address that issue. We therefore hold that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."

U.S. v. Watts, 117 S. Ct. 633, 635–38 (1997) (per curiam) (Stevens and Kennedy, JJ., dissenting).

See *Outline* at I.A.3

Violation of Supervised Release

Revocation

In Eighth Circuit, after revocation court may reimpose supervised release under § 3583(h) for defendant originally sentenced before statute's effective date. Defendant was first sentenced in 1990. He began serving his term of supervised release in May 1995, had it revoked

in October, and was sentenced to 14 months in prison with an additional supervised release term of 22 months. The district court did not specify whether it sentenced defendant under 18 U.S.C. § 3583(h), which authorized the reimposition of supervised release after revocation, effective Sept. 13, 1994, or under prior Eighth Circuit case law that interpreted 18 U.S.C. § 3583(e) to allow for reimposition after revocation, *see U.S. v. Schrader,* 973 F.2d 623 (8th Cir. 1992). Defendant challenged the new term of supervised release on ex post facto grounds.

The appellate court upheld the sentence. "In this circuit, under the prior law, the district court could impose, in addition to the term of imprisonment . . . , a new term of supervised release, so long as the aggregate of the two terms is less than or equal to the original term of supervised release. . . . We conclude that a defendant is not potentially subject to an increased penalty under § 3583(h) because, given our [earlier] interpretation of § 3583(e)(3) . . . , the maximum period of time that a defendant's freedom can be restrained upon revocation of supervised release under the new law is either the same as, or possibly less than, under the prior law. Because application of the new law does not result in an increased penalty, there is no ex post facto violation." The court distinguished *U.S. v. Beals,* 87 F.3d 854 (7th Cir. 1996), reasoning that the contrary holding was correct for the Seventh Circuit because it had previously held that reimposition after revocation was not authorized under § 3583. Thus, in the Seventh Circuit, reimposition under § 3583(h) was an ex post facto violation because it retroactively increased a defendant's potential penalty.

U.S. v. St. John, 92 F.3d 761, 765–67 (8th Cir. 1996).

See *Outline* at VII.B.1

Determining the Sentence

"Safety Valve" Provision

Ninth Circuit holds that information "provided to the Government" includes information provided to a different prosecutor in another case. Defendant pled guilty to a marijuana offense that occurred in 1994. He claimed that he qualified under 18 U.S.C. § 3553(f), USSG § 5C1.2, for sentencing below the mandatory minimum. However, there was evidence that defendant committed a similar offense in 1993, which he had not disclosed, and the government claimed that he therefore did not meet subsection (5)'s requirement to truthfully provide to the Government all information concerning the offense and related offenses. Defendant's sentencing was postponed twice, and before he was sentenced he pled guilty to and admitted his involvement in the 1993 offense, and the prosecutor in that case recommended a reduction under § 5C1.2. At the sentencing for the 1994 offense, defendant argued that, by providing information to the prosecutor in the 1993 case he satisfied subsection (5). The district court denied the reduction and defendant appealed.

The appellate court remanded, first finding that the district court erred by not providing reasons for the denial at the final sentencing hearing. "[S]ection 3553(f) states that the court shall depart from the mandatory minimum sentence if it finds '*at sentencing*' that the defendant meets all five criteria. 18 U.S.C. § 3553(f) (emphasis added); *see also* U.S.S.G. § 5C1.2. The district court thus must provide reasons for agreeing or refusing to apply section 5C1.2 at the time of sentencing."

The court then concluded that defendant satisfied subsection (5) when he was debriefed by the assistant U.S. attorney (AUSA) in the 1993 case. "A defendant need not disclose information to any particular government agent to be eligible for relief under section 5C1.2. 'The prosecutor's office is an entity,' and knowledge attributed to one prosecutor is attributable to others as well. . . . Thus, the fact that AUSA Torres-Reyes, the prosecutor in this case, was not present when AUSA Coughlin debriefed Real-Hernandez in the 1993 incident is not relevant to the question whether Real-Hernandez provided information to the 'government.'" The court also rejected the government's argument that the 1993 case debriefing should not trigger the safety valve because it "was a totally separate case and was only relevant to show [defendant] had not been truthful" when he told government agents in the 1994 case that he did not know anything. "The plain language of section 5C1.2(5) allows any provision of information in any context to suffice, so long as the defendant is truthful and complete."

U.S. v. Real-Hernandez, 90 F.3d 356, 361 (9th Cir. 1996).

See *Outline* at V.F.2

Fourth Circuit holds that government violated plea agreement by arguing against safety valve reduction after it failed to debrief defendant as promised. In its plea agreement with defendant, the government agreed that he would be debriefed by government agents. The debriefing never occurred, however, and defendant eventually submitted a proffer letter to the government attempting to explain his involvement in and knowledge of the offense. Defendant argued at sentencing that, in the absence of the promised debriefing, the letter entitled him to the safety valve reduction under § 3553(f); § 5C1.2. The government argued against the reduction, saying it could not verify the information defendant had provided. The district court, without finding whether defendant was telling the truth, determined that there was not enough information to conclude that he was and sentenced him to the statutory minimum.

The appellate court remanded. "[W]e have recognized that the burden rests on the defendant to prove that the prerequisites for application of the safety valve provision, including truthful disclosure, have been met. . . . Debriefing by the Government plays an important role in permitting a defendant to comply with the disclosure requirement of the safety valve provision and in convinc-

ing the Government of the fullness and completeness of a defendant's disclosure, thereby encouraging a favorable recommendation. . . . [W]hen the Government promises in a plea agreement to debrief a defendant, it may not thereafter simply refuse to do so and then, having deprived the defendant of his best opportunity for attempting to obtain this favorable treatment, argue that the defendant is not entitled to sentencing under the safety valve provision. . . . On remand, the Government shall comply with the plea agreement by debriefing Beltran-Ortiz prior to resentencing. The district court shall then determine whether Beltran-Ortiz has met the requirements of 18 U.S.C.A. § 3553(f)."

U.S. v. Beltran-Ortiz, 91 F.3d 665, 669 & n.4 (4th Cir. 1996).

See *Outline* at V.F.2

Supervised Release

Ninth Circuit holds that when retroactive application of guideline amendment reduces prison term to less than time already served, term of supervised release begins on date defendant should have been released. "Appellants in these consolidated cases were each convicted for growing marijuana in violation of 21 U.S.C. § 841(a) and sentenced to a term of imprisonment plus a statutory three years of supervised release. In November, 1995, each received a reduction in his custodial sentence by reason of a retroactive amendment to the sentencing guidelines which affected the manner of calculating the quantity of marijuana for sentencing purposes. Each had already spent more time in prison than required by the modified sentence."

"The government nonetheless used each prisoner's actual release date as the starting date for measuring the duration of the three years of supervised release. Appellants . . . ask[ed] the court to set the starting times for their terms of supervised release on the dates their imprisonments should have ended under the new sentences. The district court, after reviewing the stated purposes of both custody and supervised release, agreed with the government that supervised release must be measured from the actual release dates."

The appellate court reversed, concluding that, "while the statutory scheme is not crystal clear, the supervised release portion of the sentence begins on the date a prisoner's term of imprisonment expires, whether or not he is released on that date. The appellants' terms of supervised release began on the dates appellants should have been released, rather than on the dates of their actual release." The applicable statutes state that a supervised release term "commences on the day the person is released from imprisonment," 18 U.S.C. § 3624(e), and that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's term of imprisonment," § 3624(a). "Neither direct nor circumstantial evidence of legislative intent concerning the narrow question presented by this appeal is present. We know only that the revised sentencing guideline was intended to apply retroactively, and was intended to have the remedial effect of reducing sentences imposed under an earlier, more punitive sentencing formula. In a somewhat similar situation, this court contemplated a problem of clarifying when a period of supervised release was to begin. *See U.S. v. Montenegro-Rojo,* 908 F.2d 425, 431 fn. 8 (9th Cir. 1990) (stating that, in fairness, the extra time in prison should be counted towards the year of supervised release)."

"We hold that in view of the language of 18 U.S.C. § 3624(a), and because of the obvious purpose of leniency in applying the revised sentencing guidelines retroactively, we must follow the lead of this court in *Montenegro-Rojo*. We limit our holding to the unusual facts of this case, where there has been a retroactive amendment to the guidelines."

U.S. v. Blake, 88 F.3d 824, 825–26 (9th Cir. 1996). *But cf. U.S. v. Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) (per curiam) (although clarifying guideline amendment reduced defendant's sentence to less than time served, rejecting claim that excess time defendant spent in prison should be credited against his term of supervised release).

See *Outline* generally at V.C

Adjustments

Vulnerable Victim

Eighth Circuit declines to apply 1995 amendment that removed "target" language. Application Note 1 of § 3A1.1 formerly stated that the adjustment applied "where an unusually vulnerable victim is made a target" of the offense. Some circuits, including the Eighth, read that language to require that a defendant intentionally targeted the victim because of a particular vulnerability. However, the commentary was revised in 1995 by the removal of the target language "to clarify application with respect to this issue." USSG App. C, Amend. 521, at 430 (Nov. 1995). The revised note now states that the enhancement applies "to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." USSG § 3A1.1(b), comment. n.2 (Nov. 1995). The court had to determine whether it could apply the amended commentary to defendants who were sentenced before Nov. 1995.

"[N]otwithstanding the Sentencing Commission's description of Amendment 521 as a 'clarification,' we hold that applying the new language set forth in U.S.S.G. § 3A1.1 comment. (n.2) (Nov. 1995), as opposed to the language set forth in U.S.S.G. § 3A1.1 comment. (n.1) (Nov. 1994), would in this case violate the Constitution's prohibition against ex post facto laws because: the application would be retrospective; it would, if anything, increase defendants' sentences; it would not merely involve a procedural change; and it would not be offset by other ameliorative provisions. "

The court then concluded that there was no evidence to support a finding that defendants, who had defrauded couples seeking to adopt children, targeted any of the couples because of their desire to adopt or because of the infertility problems of some of the victims. In any event, the court also held that the defrauded couples' "strong desire to adopt" is not "the type of particular susceptibility contemplated by § 3A1.1," and defendants should not have received the enhancement.

U.S. v. Stover, 93 F.3d 1379, 1384–88 (8th Cir. 1996).

See *Outline* at III.A.1.a and d

Departures

Mitigating Circumstances

Ninth Circuit holds that sentencing entrapment may warrant reducing amount of drugs used to determine whether mandatory minimum applies. Defendant was convicted of conspiracy to distribute cocaine and possession of cocaine with intent to distribute. "At the sentencing hearing, the court found that sentencing entrapment had occurred, and the government did not oppose a downward departure from the applicable sentencing guideline range based upon sentencing entrapment. The district court attributed one kilogram of cocaine to Castaneda and imposed the five year statutory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(B)(ii). The court said that it lacked discretion to sentence Castaneda to a term below the statutory minimum. Castaneda timely appealed."

The appellate court remanded, reasoning that district courts determine the quantity of drugs attributable to a defendant, including amounts for purposes of establishing whether a mandatory minimum sentence applies. "If a defendant proves that sentencing entrapment has occurred, there is no sound reason that the government's wrongful conduct should be protected by a statutory minimum based upon an amount of drugs higher than a defendant was predisposed to buy or sell. . . . The district court here did not think that it had the discretion to reduce the amount of cocaine attributable to Castaneda by the amount tainted by sentencing entrapment. Otherwise, the court might have found, for example, that Castaneda lacked the predisposition to sell 500 grams or more of cocaine. Had the district court made such a finding, it could have excluded more than 500 grams from its finding of cocaine attributable to Castaneda. A finding that less than 500 grams of cocaine were attributable to Castaneda would result in no obligation to impose a statutory minimum sentence."

U.S. v. Castaneda, 94 F.3d 592, 594–96 (9th Cir. 1996). *See also U.S. v. Montoya*, 62 F.3d 1, 3 (1st Cir. 1995) (courts' authority to exclude drug amounts tainted by sentencing entrapment "applies to statutory minimums as well as to the guidelines").

See *Outline* at VI.C.4.c

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